

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NATHAN KEVIN TURNER,
CDCR #C-44886,

Plaintiff,

vs.

BONNIE DUMANIS, District Attorney;
SAN DIEGO POLICE DEPARTMENT;
A. FRAGOSO, Detective; J. DREIS,
Detective; SAN DIEGO POLICE CRIME
LAB; EDMOND G. BROWN, Jr.,
Attorney General,

Defendants.

Civil No. 08-0360 W (RBB)

ORDER:

**1) GRANTING MOTIONS TO
DISMISS ON BEHALF OF
DEFENDANTS EDMOND G.
BROWN, SAN DIEGO POLICE
DEPARTMENT AND DETECTIVE
J. DREIS PURSUANT TO
FED.R.CIV.P. 12(b)(6)
[Doc. Nos. 10, 12]**

AND

**2) GRANTING MOTION TO
DISMISS COMPLAINT ON
BEHALF OF DEFENDANT
BONNIE DUMANIS PURSUANT
TO FED.R.CIV.P. 12(b)(6)
[Doc. No. 13]**

I. Procedural Background

Nathan Kevin Turner (“Plaintiff”) has filed a civil rights complaint pursuant to 42 U.S.C. § 1983 seeking post-conviction access to biological evidence introduced against him during his 1982 trial for peeping, burglary, rape and robbery. Plaintiff claims California’s Attorney General Edmond G. Brown, San Diego County District Attorney Bonnie Dumanis, the San

1 Diego Police Department, its Crime Lab, and San Diego Police Detectives J. Dreis and A.
 2 Fragoso (“Defendants”), have violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights
 3 by either refusing to provide him with access to, or “in bad faith” destroying, this physical
 4 evidence. Plaintiff asserts this evidence if now subject to DNA testing not available at the time
 5 of his trial twenty-six years ago, would “completely and irrefutably exonerate[] [him].” (Compl.
 6 ¶¶ 15-17, 91-97.)

7 **II. Defendants’ Motions to Dismiss**

8 Defendants Brown, Dumanis, the San Diego Police Department and Detective J. Dreis
 9 have filed three separate motions to dismiss Plaintiff’s Complaint for failure to state a claim
 10 upon which § 1983 relief can be granted pursuant to FED.R.CIV.P. 12(b)(6) [Doc. Nos. 10, 12,
 11 13].¹

12 First, Defendant Brown moves to dismiss on grounds that he may not be held liable based
 13 on a respondeat superior theory. Brown further argues Plaintiff’s claims are untimely, precluded
 14 by the ‘favorable termination’ doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994), and
 15 barred by collateral estoppel. *See* P&As in Supp. of Def. Brown’s Mot. to Dismiss (hereafter
 16 ‘Brown MTD’) at 3-8. Second, Defendants San Diego Police Department (“SDPD”) and
 17 Detective J. Dreis move to dismiss on grounds that Plaintiff’s Complaint fails to comply with
 18 FED.R.CIV. P. 8, the SDPD is not a ‘person’ subject to suit under § 1983, and Plaintiff has failed
 19 to allege any personal acts on the part of Detective Dreis which may support any constitutional

20

21 ¹ Plaintiff has not successfully served the remaining Defendant, A. Fragoso, a San Diego Police
 22 Detective, who is now retired. *See* Defs. San Diego Police Dept. & Dreis’ Mem. of P&As in Supp. of
 23 Mot. to Dismiss at 2 n.2. The United States Marshal did attempt to serve Fragoso at San Diego Police
 24 Dept. Headquarters at Plaintiff’s direction based on Plaintiff’s assertion that “they have data where
 25 [Fragoso] can be located.” [Doc. No. 5]. However, while someone else in Internal Affairs signed the
 26 U.S. Marshal Form 285, it is not clear whether this person had the authority to accept service on
 27 Fragoso’s behalf. Moreover, once the remaining San Diego Police Department defendants filed their
 28 Motion, which notified both Plaintiff and the Court that they “had no information indicating that service ... ha[d] been effectuated” upon Fragoso, and therefore, were not entering an appearance on his behalf,
 Plaintiff was required to request an extension of time to re-attempt service pursuant to FED.R.CIV.P.
 4(m) at a different location. He did not; therefore, Defendant Fragoso has not been timely served and
 the Court has no personal jurisdiction over him. *See Walker v. Sumner*, 14 F.3d 1415, 1421-22 (9th Cir.
 1994) (where a pro se plaintiff fails to provide the Marshal with accurate and sufficient information to
 effect service of the summons and complaint, the court’s sua sponte dismissal of the unserved
 defendants is appropriate); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946) (“[S]ervice
 of summons is the procedure by which a court ... asserts jurisdiction over [a] party.”).

1 violation. *See* P&As in Supp. of Defs. City of San Diego & J. Dreis' Mot. to Dismiss (hereafter
 2 "City MTD") at 3-8. Finally, Defendant Bonnie Dumanis acknowledges the Ninth Circuit has
 3 recognized a limited due process right to seek post-conviction access to biological evidence in
 4 a § 1983 action in *Osborne v. District Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008), *pet. for*
 5 *cert. granted*, 129 S. Ct. 488 (U.S. Nov. 3, 2008) (No. 08-6). However, Dumanis nevertheless
 6 seeks dismissal on grounds that Plaintiff's Complaint seeks relief based on claims
 7 distinguishable from those recognized in *Osborne*. *See* P&As in Supp. of Def. Bonnie Dumanis'
 8 Mot. to Dismiss (hereafter "Dumanis MTD") at 5-6.

9 **A. Standard of Review pursuant to FED.R.CIV.P. 12(b)(6)**

10 A Rule 12(b)(6) dismissal may be based on either a "'lack of a cognizable legal theory'
 11 or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v.*
 12 *Riverside Healthcare System, LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri*
 13 *v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). In other words, the plaintiff's
 14 complaint must provide a "short and plain statement of the claim showing that [he] is entitled
 15 to relief." *Id.* (citing FED.R.CIV.P. 8(a)(2)). "Specific facts are not necessary; the statement need
 16 only give the defendant[s] fair notice of what ... the claim is and the grounds upon which it
 17 rests." *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (internal quotation marks
 18 omitted).

19 Still, every complaint must, at a minimum, plead "enough facts to state a claim for relief
 20 that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, ___, 127 S.Ct. 1955, 1974
 21 (2007); *Weber v. Dept. of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). Facts which
 22 are alleged in the complaint are presumed true, and the court must construe them and draw all
 23 reasonable inferences from them in favor of the plaintiff. *Cahill v. Liberty Mutual Ins. Co.*, 80
 24 F.3d 336, 337-38 (9th Cir. 1996).

25 In addition, factual allegations asserted by pro se petitioners, "however inartfully
 26 pleaded," are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines*
 27 *v. Kerner*, 404 U.S. 519-20 (1972). Thus, where a plaintiff appears in propria persona in a civil
 28 // /

1 rights case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the
 2 doubt. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

3 Nevertheless, and in spite of the deference the court is bound to pay to any factual
 4 allegations made, it is not proper for the court to assume that “the [plaintiff] can prove facts
 5 which [he or she] has not alleged.” *Associated General Contractors of California, Inc. v.*
 6 *California State Council of Carpenters*, 459 U.S. 519, 526 (1983). Nor must the court “accept
 7 as true allegations that contradict matters properly subject to judicial notice or by exhibit” or
 8 those which are “merely conclusory,” require “unwarranted deductions” or “unreasonable
 9 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.) (citation omitted),
 10 *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001); *see also Ileto v. Glock Inc.*, 349 F.3d
 11 1191, 1200 (9th Cir. 2003) (court need not accept as true unreasonable inferences or conclusions
 12 of law cast in the form of factual allegations).

13 **B. Plaintiff’s Allegations**

14 Plaintiff claims to have been “formally charged with fifty-five counts ranging from
 15 peeping, burglary, rape [and] robbery[] while armed with a deadly weapon,” was represented
 16 by counsel at trial, convicted on March 22, 1982, and sentenced to a “very lengthy determinant
 17 state prison term” of 174 years and 4 months. (Compl. ¶¶ 15, 25.) Plaintiff alleges that during
 18 investigation and trial, “the biological evidence, that is, ‘all’ the semen samples taken directly
 19 from the victims[’] multiple slides, e.g., vaginal smears, mouth[] smears[] and [a] tampon” were
 20 tested by the San Diego Police Department crime lab and revealed to be blood type “A” and
 21 “B.” Plaintiff claims his blood type is “O.” (*Id.* ¶¶ 17-19.) Plaintiff alleges that when this
 22 “became known to the prosecution, [he] was offered 75 years to plead to all counts,” but he
 23 refused to plea because “he would be pleading guilty to crimes that he did not commit and did
 24 not believe in face of all the overwhelming physical that excluded [him], that he would be found
 25 guilty.” (*Id.* ¶ 19.)

26 Plaintiff alleges his trial commenced on January 11, 1982. (*Id.* ¶ 22.) Throughout trial,
 27 Plaintiff claims he “maintained his innocence of any crimes of robbery, rape, burglary and
 28 peeping” against all 18 victims, claiming he “had absolutely nothing to do with these crimes.”

1 (*Id.* ¶¶ 16, 23.) However, “in order for [the] prosecution to undermine th[e] explosive evidence
 2 that was completely in [his] favor,” and “in order to get a conviction ... notwithstanding [his]
 3 innocence,” Plaintiff claims prosecutors “introduced a false/alleged confession, and several
 4 inconclusive samples that did not match [his] DNA blood type.” (*Id.* ¶ 20.) Plaintiff claims
 5 Defendant San Diego Police Detectives J. Dreis and A. Fragoso “were responsible for” the
 6 introduction of this evidence. (*Id.*) Plaintiff further claims he was “denied access to test and
 7 evaluate this evidence” at trial because his trial counsel “never employed the services of an
 8 expert witness or an investigator to confirm the prosecutor’s findings,” and the judge denied “all
 9 requests for funds to employ such services.” (*Id.* ¶ 21.)

10 Plaintiff claims he was convicted on March 22, 1982, that his conviction was affirmed
 11 by the California Court of Appeal “on or about March 30, 1983.” (*Id.* ¶ 24.) Plaintiff claims the
 12 issues raised in his direct appeal in California’s Fourth District Court of Appeal, Case No. 13857
 13 included challenges to the admissibility of a confession influenced by PCP use, incompetent
 14 counsel, the trial court’s refusal to appoint new counsel, its failure to properly instruct an
 15 alternate juror and the imposition of an “unconstitutional” sentence. (*Id.* ¶ 26.) Plaintiff alleges
 16 his appeal was rejected as “meritless” and both his conviction and sentence were affirmed. (*Id.*)

17 Plaintiff also refers to a “direct appeal” which was “lost in August 26, 1983,” and claims
 18 it is “unclear” whether he filed a petition for review with the California Supreme Court. (*Id.*
 19 ¶ 25.) He further alleges that “according a the federal case opinion,” which may be either
 20 Plaintiff’s initial habeas corpus petition filed on March 10, 1985, or his Ninth Circuit appeal in
 21 *Turner v. Compo*, 827 F.2d 526 (9th Cir. 1987), the “State Supreme Court summarily denied
 22 a petition for review [of Plaintiff’s direct appeal] without comment.” (*Id.* ¶¶ 27-34.) Plaintiff
 23 alleges the filing and decision date, as well as the issues raised in his petition for review to the
 24 California Supreme Court, are “unknown.” (*Id.* ¶ 27.)

25 From that time on, Plaintiff alleges to have had “litigation ongoing until the AEDPA
 26 [Anti-Terrorism and Effective Death Penalty Act] of 1996,” including numerous state and
 27 federal petitions for writ of habeas corpus. (*Id.* ¶¶ 24, 28-40.) In at least one of these petitions,
 28 San Diego Superior Court Case No. HC14929, which was denied on May 19, 1997, Plaintiff

1 claims to have raised eleven grounds for relief, including one challenge to the “introduction and
 2 use of DNA evidence.” (*Id.* ¶ 38.) A writ of habeas corpus followed in the Fourth District Court
 3 of Appeal, Case No. D029361, which likewise raised a claim of “excluded exculpatory DNA
 4 evidence.” However, on October 3, 1997, this petition was also denied because Plaintiff “did
 5 not present a prima facie case.” (*Id.* ¶ 39.)

6 Plaintiff filed another state habeas corpus petition in San Diego Superior Court Case No.
 7 HC14929 (2d Petition) which he claims was denied on March 13, 1998, for “failing to provide
 8 justification for filing numerous habeas claims.” (*Id.* ¶ 40.) Plaintiff claims this petition
 9 included a motion to introduce new DNA evidence. (*Id.*)

10 Sometime in 2000 or 2001, Plaintiff alleges to have contacted the Innocence Project at
 11 Cardoza School of Law and through them was able to obtain “all the destruction orders” for his
 12 case. (*Id.* ¶ 42.) Plaintiff admits an Order to destroy or release trial exhibits in his criminal case
 13 was issued by the San Diego Superior Court sometime in either February or August 1987. (*Id.*
 14 ¶¶ 25, 68.)

15 However, on December 4, 2002, Plaintiff alleges he filed a motion in San Diego Superior
 16 Court requesting the retention of biological material pursuant to California Penal Code § 1417.9,
 17 the performance of DNA testing, appointment of counsel and a new trial pursuant to California
 18 Penal Code § 1405.² (*Id.* ¶ 43.)

19 Plaintiff claims that Deputy Public Defender Susan Clemens was assigned to assist him
 20 in locating and preserving DNA evidence on or about September 2, 2003. (*Id.* ¶ 44.) Plaintiff
 21 claims Clemens learned from the San Diego Police Department’s property room supervisor and
 22 the senior exhibit custodian for the San Diego Superior Court that “all evidence presented at [his]
 23 trial remained in the court’s possession after [his] conviction and was destroyed after the
 24

25 ² California Penal Code § 1405 provides, in pertinent part, that “[a] person who was convicted
 26 of a felony and is currently serving a term of imprisonment may make a written motion before the trial
 27 court ... for performance of forensic deoxyribonucleic acid (DNA) testing.” CAL. PENAL CODE
 28 § 1405(a). “An indigent convicted person may request appointment of counsel.” *Id.* § 1405(b)(1).
 “Section 1405, subdivision (f) directs the trial court to grant the motion for DNA testing if eight
 conditions are met.” *Richardson v. Superior Court*, 43 Cal. 4th 1040, 1046 (2008). The first condition
 requires that “the evidence to be tested is available an in a condition that would permit the DNA testing
 requested in the motion.” *Id.* (citing CAL. PENAL CODE § 1405(f)(1)).

1 California Court of Appeal affirmed [his] conviction.” (*Id.*) However, Clemens also informed
 2 Plaintiff that she “wanted to conduct her own research to determine if ‘any’ of [his] DNA
 3 evidence was available.” (*Id.* ¶ 65.)

4 On November 21, 2003, Plaintiff claims Clemens advised him that she had scheduled a
 5 hearing in Superior Court in Plaintiff’s case, but that “all the evidence had indeed been
 6 destroyed.” (*Id.* ¶ 66.) Plaintiff claims Clemens “enclosed declarations from the San Diego
 7 County Police Department Senior Exhibit Custodian of Records and Property Room
 8 Supervisor.” (*Id.*)

9 On or about February 13, 2004, Plaintiff alleges Clemens “wrote Plaintiff another letter
 10 reiterating that Plaintiff’s biological evidence had been destroyed,” and that “we are unable to
 11 proceed with DNA testing because all the evidence is gone.” (*Id.* ¶¶ 45, 67.) Clemens further
 12 noted, however, that she was “looking into the timing and circumstances of the destruction of
 13 evidence to determine if there [wa]s any relief available” based on claims of its “illegal
 14 destruction.” (*Id.* ¶ 67.)

15 On or about March 17, 2005, Plaintiff claims he received another letter from Clemens
 16 indicating she had “abandoned the possible illegal destruction of evidence investigation,”
 17 because Plaintiff did not “request the preservation of evidence in [his] federal filing.” (*Id.* ¶ 69.)
 18 On the same day, Plaintiff claims Clemens wrote to the Superior Court Judge indicating that the
 19 “investigation [wa]s now complete … [and that] it can not be shown that the evidence was
 20 wrongfully destroyed.” (*Id.* ¶ 73.)

21 Plaintiff claims he told Clemens “her position was in error because the San Diego Police
 22 Department and the district attorney’s office had specific knowledge that Plaintiff had an on-
 23 going post-conviction litigation pending, and [therefore] it was their obligation to check before
 24 any such destruction would take place.” (*Id.* ¶ 70 (emphasis original).) However, Clemens
 25 “closed Plaintiff’s case under Penal Code § 1405,” and “refused to provide Plaintiff with further
 26 assistance.” (*Id.* ¶ 71.)

27 Plaintiff also claims that on or soon after March 17, 2005, the San Diego Superior Court
 28 denied his Motion for DNA testing pursuant to Penal Code § 1405, and denied his petition for

1 habeas corpus. (*Id.* ¶ 82.) Plaintiff claims his Penal Code § 1405 Motion was denied because
 2 he has “fail[ed] to meet the prima facie elements enumerated under P[enal] C[ode] § 1405,” and
 3 specifically “failed to show the material sought for testing is available.” (*Id.* ¶¶ 83-84 (emphasis
 4 original).)

5 Plaintiff asserts that “[i]n light of the state’s destruction of evidence in his case,” “there
 6 is absolutely no question that the police authorities of San Diego County knew that [he] did not
 7 commit any such crime of rape,” and that they “intentionally had all Plaintiff’s evidence
 8 destroyed so that he could not prove his innocence.” (*Id.* ¶¶ 72, 85.)

9 Thus, while Plaintiff alleges the biological evidence in his case was destroyed “in bad
 10 faith to hide the true exculpatory results,” (*id.* ¶ 85), he also seeks equitable and injunctive relief
 11 “including, but not limited to, a search for the release of any and all biological evidence,
 12 notwithstanding the fact that Defendant Bonnie Dumanis claims that the DNA evidence was
 13 destroyed on August 6, 1987.” (*Id.* at 24 “Prayer for the Appropriate Relief” ¶ 1.) Plaintiff
 14 further seeks a court-ordered investigation into “whether or not the defendants[’] predecessors
 15 intentionally ordered ... DNA evidence to be destroyed during [his] on-going post-conviction
 16 litigation” as well as a determination as to whether it was “illegally done in ‘bad faith’ to hide
 17 its exculpatory value.” (*Id.* ¶ 5.)

18 **C. 42 U.S.C. § 1983**

19 To state a claim under § 1983, Plaintiff must allege that: (1) the conduct he complains
 20 of was committed by a person acting under color of state law; and (2) that conduct violated a
 21 right secured by the Constitution and laws of the United States. *Humphries v. County of Los*
 22 *Angeles*, __ F.3d __, 2009 WL 102101 at *10 (9th Cir. 2009) (citing *West v. Atkins*, 487 U.S. 42,
 23 48 (1988)).

24 **1. “Person”**

25 First, the SDPD seeks dismissal because it is not a “person” subject to suit under § 1983.
 26 (*See* City MTD at 4-5.)³

27
 28 ³ Plaintiff’s Complaint names both the SDPD and the SDPD Crime Lab as Defendants. (Compl. at 2-3.) The City’s MTD does not differentiate between the two.

1 The Court agrees. While local governmental units, such as counties or municipalities, are
 2 considered “persons” within the meaning of Section 1983, *see Will v. Michigan Dept. of State*
 3 *Police*, 491 U.S. 58, 70 (1989); *Monell v. Dept. of Social Servs.*, 436 U.S. 658 690-91 & n.54
 4 (1978), municipal departments and sub-units, including police departments, are not. *See United*
 5 *States v. Kama*, 394 F.3d 1236, 1239 (9th Cir. 2005) (Ferguson, J., concurring) (finding
 6 municipal police departments and bureaus are generally not considered “persons” within the
 7 meaning of 42 U.S.C. § 1983); *Vance v. County of Santa Clara*, 928 F. Supp. 993, 995-96 (N.D.
 8 Cal. 1996) (holding that the naming of a municipal department as a defendant “is not an
 9 appropriate means of pleading a § 1983 action against a municipality”); *Brockmeier v. Solano*
 10 *County Sheriff’s Dept.*, 2006 WL 3760276, *4 (E.D. Cal. 2006) (finding that sheriff’s department
 11 is a municipal department and not a proper defendant for purposes of plaintiff’s § 1983 claims).

12 For these reasons, the Court GRANTS the City’s Motion to Dismiss pursuant to
 13 FED.R.CIV.P. 12(b)(6) to the extent Plaintiff seeks to sue both the SDPD and its Crime Lab under
 14 section 1983.

15 **2. Individual Liability – Defendants Brown & Dries**

16 Both Defendants Brown, the current Attorney General for the State of California, and
 17 SDPD Detective Dries also move to dismiss Plaintiff’s claims on grounds that he has failed to
 18 allege that either of them are personally liable for violating his constitutional rights. (*See* Brown
 19 MTD at 3-4; City MTD at 5-6.)

20 There is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*,
 21 9 F.3d 1433, 1437-38 (9th Cir. 1993). To state a claim against a state official under section
 22 1983, Plaintiff must allege direct personal participation by the defendant. *Taylor v. List*, 880
 23 F.2d 1040, 1045 (9th Cir. 1989). “[A] supervisor [may be held] liable for the acts of his
 24 subordinates ‘if the supervisor participated in or directed the violations, or knew of the violations
 25 [of subordinates] and failed to act to prevent them.’” *Preschooler II v. Clark County School Bd.*
 26 *of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007) (quoting *Taylor*, 880 F.2d at 1045.) However,
 27 “a supervising official may be liable in his individual capacity [only] if he ‘set in motion a series
 28 of acts by others, or knowingly refused to terminate a series of acts by others, which he knew

1 or reasonably should have known, would cause others to inflict constitutional injury.”” *Beck v.*
 2 *City of Upland*, 527F.3d 853, 871 (9th Cir. 2008) (quoting *Larez v. City of Los Angeles*, 946 F.2d
 3 630, 646 (9th Cir. 1991) (internal citations omitted)).

4 Here, Plaintiff alleges Brown is being sued merely because he “is the Attorney General
 5 of the State of California who resides [sic] over all.” (Compl. ¶ 14.) Plaintiff makes no further
 6 allegations involving Defendant Brown. Thus, because § 1983 liability requires allegations of
 7 direct personal participation causing constitutional injury, *Taylor*, 880 F.2d at 1045, and does
 8 not, without more permit suit against a state official based solely on the office he or she currently
 9 holds, *Palmer*, 9 F.3d at 1437-38, the Court GRANTS Defendant Brown’s Motion to Dismiss
 10 Plaintiff’s Complaint pursuant to FED.R.CIV.P. 12(b)(6). *See also Clifton v. Cline*, 2009 WL
 11 256548 at *5 (E.D. Cal. Feb. 4, 2009) (unpublished) (dismissing Attorney General Brown as
 12 defendant in § 1983 action alleging due process right to access DNA evidence on grounds
 13 because complaint did not allege that the Attorney General “[wa]s connected to the denial of
 14 Plaintiff’s constitutional rights based on [his] responsibilities under Section 1405.”)

15 As for Detective Dreis, Plaintiff seeks to sue him because he “collected crime scene
 16 evidence and stored it,” was “a reporting officer,” and was “responsible for th[e] introduction
 17 of [a] false/alleged confession and evidence” introduced at Plaintiff’s 1982 trial. (*Id.* ¶¶ 13, 20.)
 18 Plaintiff does not allege, however, that Dreis personally violated his due process rights by
 19 refusing to provide him with access to the biological evidence he now seeks or, in the alternative,
 20 was the person responsible for the destruction of that evidence. *See Paine v. City of Lompoc*,
 21 265 F.3d 975, 984 (9th Cir. 2001) (whether or not each defendant “is a participant in the
 22 incidents that could give rise to liability” is a necessary element of the § 1983 claim). For these
 23 reasons, the Court also dismisses Plaintiff’s claims against Defendant Dreis and GRANTS his
 24 Motion to Dismiss pursuant to FED.R.CIV.P. 12(b)(6).⁴

25 **3. Constitutional Violations**

26
 27 ⁴ Because the Court finds Plaintiff’s Complaint fails to state a claim against either Defendant
 28 Brown or Dreis for these fundamental reasons, it need not reach those Defendants’ alternative bases for
 dismissal, i.e., that Plaintiff’s Complaint fails to comply with FED.R.CIV.P. 8, his claims are barred both
 by *Heck v. Humphrey*, 512 U.S. 477 (1994), the statute of limitations, and are further subject to
 collateral estoppel. (Brown MTD at 5-8; City MTD at 3-4.)

1 The sole remaining Defendant, the current District Attorney for the County of San Diego,
 2 Bonnie Dumanis, also moves to dismiss Plaintiff's Complaint pursuant to FED.R.CIV.P. 12(b)(6).
 3 Dumanis claims that while the Ninth Circuit has held that a due process right to access material
 4 evidence for post-conviction testing may be raised in a civil rights action pursuant to 42 U.S.C.
 5 § 1983, *see Osborne v. District Attorney's Office*, 423 F.3d 1050, 1054 (9th Cir. 2005)
 6 ("Osborne I"), the claims in Plaintiff's Complaint are distinguishable and exceed the limited
 7 right recognized as cognizable in a § 1983 action in *Osborne v. District Attorney's Office*, 521
 8 F.3d 1118 (9th Cir. 2008) ("Osborne II"), *cert. granted*, 129 S. Ct. 488 (U.S. Nov. 3, 2008) (No.
 9 08-6).

10 The crux of this case, like the *Osborne* case, lies at the intersection of § 1983 and habeas
 11 corpus. These two post-conviction avenues of relief may, and sometimes must, be kept separate;
 12 but often they overlap. As a preliminary matter, "when a state prisoner is challenging the very
 13 fact or duration of his physical imprisonment, and the relief he seeks is a determination that he
 14 is entitled to immediate or a speedier release from that imprisonment, his sole federal remedy
 15 is a writ of habeas corpus." *Osborne I*, 423 F.3d at 1053 (quoting *Preiser v. Rodriguez*, 411 U.S.
 16 475, 500 (1973).) Thus, if a prisoner brings a civil rights action under § 1983, which if
 17 successful, would "necessarily imply the invalidity" of his conviction or sentence, it must be
 18 dismissed "unless the plaintiff ... demonstrate[s] that the conviction or sentence has already been
 19 invalidated." *Id.* (quoting *Heck*, 512 U.S. at 487). *Heck*'s conclusion relies on the "hoary
 20 principle that civil tort actions are not the appropriate vehicles for challenging the validity of
 21 outstanding criminal judgments." *Heck*, 512 U.S. at 486. A constitutional challenge to the "fact
 22 or duration" of confinement lies instead, at the "core" of habeas corpus. *Id.* at 487.

23 However, just because a claim can be brought in habeas, does not mean that it must.
 24 *Osborne I*, 423 F.3d at 1055. For example, in *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the
 25 Supreme Court recently considered whether a § 1983 action brought by two prisoners seeking
 26 only injunctive relief and challenging the constitutionality of parole eligibility and suitability
 27 hearings was barred by what has become known as *Heck*'s "favorable termination" requirement.
 28 The Court found that it was not—finding that such claims, if successful, would not

1 “necessarily vitiate the legality of (not previously invalidated) state confinement.” *Id.* at 81
 2 (emphasis added). Instead, “success for [one plaintiff] d[id] not mean immediate release from
 3 confinement or a shorter stay in prison; it mean[t] at most a new eligibility review, which at most
 4 w[ould] speed *consideration* of a new parole application.” *Id.* at 82 (italics original). “Success
 5 for [the other plaintiff] mean[t] at most a new parole hearing at which [state] parole authorities
 6 m[ight] in their discretion, decline to shorten his prison term.” *Id.* Because neither of these
 7 scenarios “would necessarily demonstrate the invalidity” of either plaintiff’s confinement or its
 8 duration, both were “cognizable under § 1983.” *Id.*

9 These authorities pre-dated *Osborne*, where the Plaintiff, a state prisoner like Plaintiff in
 10 this case, filed a § 1983 action seeking to compel the state of Alaska to release biological
 11 evidence used to convict him in 1994 of kidnaping and assault. *Osborne I*, 423 F.3d at 1051.
 12 The district court dismissed Osborne’s complaint for failing to state a claim, however, finding
 13 that because he sought to “set the stage” for an attack on the validity of a criminal conviction that
 14 had yet to be invalidated, his sole remedy was a writ of habeas corpus. *Id.* (citing *Heck*, 512 U.S.
 15 at 477).

16 The Ninth Circuit reversed, however, and once again addressing the interplay between
 17 § 1983 and habeas corpus, found that *Heck* “does not bar a prisoner’s § 1983 action seeking
 18 post-conviction access to biological evidence in the government’s possession.” *Osborne I*, 423
 19 F.3d at 1054. The Ninth Circuit found it “clear ... as a matter of logic, that success in such an
 20 action would not ‘necessarily demonstrate the invalidity of confinement or its duration,’ *id.*
 21 (quoting *Wilkinson*, 544 U.S. at 78), because: 1) “success would yield only *access* to the
 22 evidence—nothing more,” 2) “further DNA analysis may prove exculpatory, inculpatory, or
 23 inconclusive; thus there is a significant chance that the results will either confirm or have no
 24 effect on the validity of [the plaintiff’s] confinement;” and 3) “even if the results exonerate [the
 25 plaintiff], a separate action—alleging a separate constitutional violation altogether—would be
 26 required to overturn his conviction.” *Id.* at 1054-55 (internal citations omitted).

27 ///

28 On remand, the district court then concluded, as matter of first impression, that “there

1 does exist, under the unique and specific facts presented, a very limited constitutional right” to
 2 access biological evidence for the purpose of subjecting it to DNA testing. *Osborne v. District*
 3 *Attorney’s Office*, 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006) (italics original). The district
 4 court expressly limited the contours of such a claim, however, noting that its conclusion was
 5 premised on the following: 1) the testing sought was not available at the time of the plaintiff’s
 6 trial; 2) the testing sought could be “easily performed without cost or prejudice to the
 7 Government,” and 3) the test results could “either confirm Plaintiff’s guilt or provide evidence
 8 upon which Plaintiff might seek a new trial.” *Id.* Specifically, the court noted its conclusion
 9 “assume[d] the availability of the evidence sought,” because “[i]f the evidence were no longer
 10 available, for any legitimate reason, there [would] exist[] no right to test it and no basis upon
 11 which Plaintiff could pursue the issue further.” *Id.* at 1082.

12 The state appealed the district court’s conclusion, but in *Osborne II*, the Ninth Circuit
 13 affirmed, holding that:

14 Osborne’s right to due process of law prohibits the State from
 15 denying him reasonable access to biological evidence for the
 16 purpose of further DNA testing, where that biological evidence was
 17 used to secure his conviction, the DNA testing is to be conducted
 18 using methods that were unavailable at the time of trial and are far
 19 more precise than the methods that were then available, such
 20 methods are capable of conclusively determining whether Osborne
 21 is the source of the genetic material, the testing can be conducted
 22 without cost or prejudice to the State, and the evidence is material
 23 to available forms of post-conviction relief.

24 521 F.3d at 1141-42. The Court was again careful, however, to limit its holding to only the
 25 “certain set of circumstances” present in Osborne’s case, and, left “for another day” questions
 26 such as:

27 whether the scope of the right of post-conviction access should be
 28 broader or flexible to accommodate different circumstances,
 29 whether the materiality standard for post-conviction
 30 access-to-evidence claims should be less stringent or defined in a
 31 different manner, and whether prisoners with a less compelling case
 32 might also be entitled to post-conviction access.
Id. at 1142.

33 ///

34 The Supreme Court has granted certiorari in *Osborne II*, but has yet to issue its opinion.

1 In the meantime, however, *Osborne* remains binding precedent in this Circuit. Thus, this Court
 2 must decide whether Plaintiff's Complaint alleges a set of circumstances similar to those held
 3 cognizable under § 1983 in *Osborne I & Osborne II*, or whether Plaintiff's allegations are
 4 sufficiently distinguishable such that they require dismissal pursuant to FED.R.CIV.P. 12(b)(6).
 5 See *Johnson*, 534 F.3d at 1121-22 (dismissal is appropriate under Rule 12 if a complaint "lack[s]
 6 ... a cognizable legal theory" which would entitle the plaintiff to relief).

7 **i. Dumanis appropriate Defendant**

8 As a preliminary matter, the Court notes that to the extent Plaintiff's Complaint seeks
 9 only equitable and injunctive relief in the form of court-ordered access to physical evidence used
 10 against him at trial for purposes of post-conviction DNA testing, Defendant Dumanis, in her
 11 official capacity as the District Attorney for the County of San Diego, appears to be the
 12 appropriate defendant. See *Osborne II*, 521 F.3d at 1122; *Walters v. Superior Court*, 80 Cal.
 13 App.4th 1074, 1076-77 (Cal. Ct. App. 2000) (physical evidence collected during investigation
 14 of a criminal proceeding is the responsibility of the prosecutor and not that of some third party
 15 in possession).

16 **ii. Whether Plaintiff states a claim under *Osborne***

17 However, while Dumanis acknowledges *Osborne*, she claims Plaintiff's Complaint must
 18 nevertheless be dismissed because *Osborne* held such a right existed only "under the unique and
 19 specific facts of [that] case and *assum[ed]* the availability of the evidence in question." (Dumanis
 20 MTD at 5-6 quoting *Osborne II*, 521 F.3d at 1122 (emphasis added).) Dumanis
 21 asserts that because Plaintiff "affirmatively alleges that he was informed by the District
 22 Attorney's 'DNA Project' and by others that the evidence in question no longer exists," he has
 23 failed to state a due process claim under *Osborne*. (*Id.* at 6, citing Compl. at ¶¶ 25, 42, 45, 50,
 24 66, 68, 72.) The Court agrees. To the extent Plaintiff claims the physical evidence he seeks no
 25 longer exists, and to the extent he affirmatively admits the California Penal Code § 1405 motion
 26 he filed in San Diego Superior Court was denied because he "failed to show the material sought
 27 for testing is available," see Compl. ¶¶ 25, 68, 44, 45, 65, 66, 67, 83-85, Plaintiff has failed to
 28 state a due process claim cognizable under § 1983. See *Osborne II*, 521 F.3d at 1122, 1127-28

1 (noting that cognizability of due process claim to post-conviction access to evidence in § 1983
 2 action depends, in part, on the “availability of the evidence sought.”) “If the evidence [is] no
 3 longer available, for any legitimate reason, there exists no right to test it and no basis upon which
 4 Plaintiff could pursue the issue further.” *Id.* at 1128 (citation omitted).

5 Finally, to the extent Plaintiff seeks relief in this § 1983 action based on claims that
 6 evidence was destroyed in “bad faith” and in violation of his Sixth, Eighth or Fourteenth
 7 Amendment rights, this is a claim arising under *Brady v. Maryland*, 373 U.S. 83 (1963) and its
 8 progeny, and “not the sort of relief that can be granted under *Osborne*.” (Dumanis MTD at 6.)
 9 Unlike the limited situation presented in *Osborne*, allegations that Dumanis’ predecessors
 10 “intentionally ordered … DNA evidence to be destroyed” “in bad faith to hide the true
 11 exculpatory results,” see Compl. ¶ 85, *would* necessarily imply or demonstrate the invalidity of
 12 Plaintiff’s confinement or its duration, and thus, may not be raised in a § 1983 suit unless
 13 Plaintiff has already invalidated his underlying conviction. *Heck*, 512 U.S. at 486-87; *Wilkinson*,
 14 544 U.S. at 81.

15 This is because in order to prevail on destruction of evidence claim, Plaintiff would have
 16 to prove both that the now-unavailable biological evidence admitted against him at trial
 17 “possess[ed] an exculpatory value that was apparent before the evidence was destroyed, and
 18 [was] of such a nature that [he] would be unable to obtain comparable evidence by other
 19 reasonably available means,” *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), and that
 20 it was destroyed “in bad faith.” *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (“unless a
 21 criminal defendant can show bad faith on the part of the police, failure to preserve potentially
 22 useful evidence does not constitute a denial of due process of law”). A determination that
 23 Plaintiff is entitled to declaratory or injunctive relief because the state or its agents in bad faith
 24 destroyed or failed to preserve material exculpatory evidence *would*, unlike the limited due
 25 process right to merely *access* available evidence for purposes of subjecting it to advanced DNA
 26 testing, necessarily demonstrate the invalidity of his conviction. *See Strickler v. Greene* 527
 27 U.S. 263, 266 (1999) (upon the showing of a *Brady* violation, the defendant is entitled to a new
 28 trial); *see also Ciria v. Rubino*, 2008 WL 4287558 at *6-7 (N.D. Cal. Sept. 17, 2008) (unpub.).

1 (concluding that unlike the due process right to access in *Osborne*, a plaintiff “cannot avoid the
 2 *Heck bar*” if he asserts a *Brady* violation in his § 1983 complaint).

3 Thus, because Plaintiff’s Complaint affirmatively admits he has for more than two
 4 decades been unsuccessful in overturning his 1982 conviction either on direct appeal, or through
 5 multiple state and federal post-conviction habeas proceedings, *see Compl. at ¶¶ 25, 27-34, 39-40,*
 6 82, his bad faith destruction of biological evidence claims arising under *Brady*, *Trombetta* and
 7 *Youngblood* may not proceed pursuant to § 1983. Instead, Plaintiff’s exclusive remedy, one to
 8 which he has unsuccessfully resorted several times in the past, is habeas corpus. *See Ybarra v.*
 9 *Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 682 (1984) (concluding that § 1983
 10 action seeking declaratory judgment based on prosecutor’s alleged failure to preserve *Brady*
 11 evidence required dismissal because “in order to prevail on this claim, [plaintiff] must
 12 collaterally void his state court conviction”) (citing *Preiser*, 411 U.S. at 500.).

13 In conclusion, the Court finds that Plaintiff’s claims against Defendant Dumanis are not
 14 like those found as cognizable in *Osborne*, and as such, they must be dismissed for failing to
 15 state a claim upon which § 1983 relief can be granted. *See Twombly*, 550 U.S. at ___, 127 S. Ct.
 16 at 1974; *Johnson*, 534 F.3d at 1121-22.

17 Moreover, because the Court finds amendment of Plaintiff’s § 1983 claims would be
 18 futile, leave to amend is denied. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir.
 19 1996) (denial of a leave to amend is not an abuse of discretion where further amendment would
 20 be futile); *see also Robinson v. California Bd. of Prison Terms*, 997 F. Supp. 1303, 1308 (C.D.
 21 Cal. 1998) (“Since plaintiff has not, and cannot, state a claim containing an arguable basis in
 22 law, this action should be dismissed without leave to amend; any amendment would be futile.”)
 23 (citing *Newland v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996)).

24 **III. Conclusion and Order**

25 Based on the foregoing, the Court hereby:

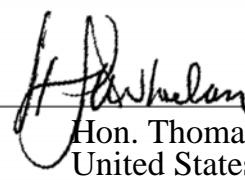
- 26 1) **GRANTS** Defendant Brown’s Motion to Dismiss pursuant to FED.R.CIV.P.
 27 12(b)(6) [Doc. No. 10];
- 28 2) **GRANTS** Defendants Dreis’ and San Diego Police Department’s Motion to

1 Dismiss pursuant to FED.R.CIV.P. 12(b)(6) [Doc. No. 12];
2 3) **GRANTS** Defendant Dumanis' Motion to Dismiss pursuant to FED.R.CIV.P.
3 12(b)(6) [Doc. No. 13]; and
4 4) **DISMISSES** Plaintiff's Complaint as to Defendant A. Fragoso pursuant to
5 FED.R.CIV.P. 4(m).

6 The Clerk shall close the file.

7 **IT IS SO ORDERED.**

8
9 DATED: March 3, 2009

10 
11 Hon. Thomas J. Whelan
12 United States District Judge

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